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PP v. JAMES WINSAN

HIGH COURT MALAYA, TAIPING
MOHAMED ZAINI MAZLAN JC
[CRIMINAL TRIAL NO: 45A-13-12-2012]
12 NOVEMBER 2015

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CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Conduct of accused – Whether considered – Whether act of accused fleeing from police showed that he had possession of drugs – Whether accused knew he was being chased by police – Whether accused acted in fear – Allegation that another person threw drugs into accused's car – Prosecution's failure to call said person or to offer to defence – Whether material witness – Whether created gap in prosecution's case – Whether accused discharged and acquitted – Evidence Act 1950, ss. 8 & 9*

C

CRIMINAL PROCEDURE: *Witness – Material witness – Failure to call – Trafficking in dangerous drugs – Whether prosecution took necessary steps to locate whereabouts of witness – Whether absence of witness created gap in prosecution's case*

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EVIDENCE: *Witness – Failure of prosecution to call witness – Trafficking in dangerous drugs – Whether prosecution took necessary steps to locate whereabouts of witness – Whether absence of witness created gap in prosecution's case*

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Based on information received in relation to a drug transaction that would occur between two Indian men, a police team dressed in civilian clothes was stationed in their designated spots to observe the said transaction that would take place in a car park. All four teams were in unmarked police cars. At around 4.15pm, a dark green coloured Toyota Camry ('Camry') driven by a person identified as Vijayan, was seen approaching the open car park and stopped his car after making one round. Soon thereafter, a white Perodua Viva driven by the accused was seen heading towards the Camry. No other vehicles were seen in that area. The police ('PW3') involved in the task testified that the accused drove his car slowly alongside Vijayan's car and both men were seen communicating to each other using hand signals while they were still in their respective cars. The police team managed to block Vijayan's car and the accused was caught after the police chased behind him for about two kilometres. According to PW3 and PW6, the accused was seated alone in his car and held up his hand to surrender. Upon examination, a black plastic bag underneath the accused's legs on the floorboard of the driver's seat was found. The substance was later confirmed to be dangerous drugs weighing 107.44g which consisted of 49.88g heroin and 57.56g of monoacetylmorphines. The accused was subsequently charged in the High Court for committing an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). *Vide* his defence, the accused asserted, *inter alia*, that

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(i) the drugs did not belong to him; (ii) Vijayan threw the plastic bag which contained the drugs into his car; (iii) he thought the plastic bag contained the sum of RM15,000 which Vijayan owed him; (iv) he thought robbers were chasing him for the money; and (v) no evidence was led to show that the police identified themselves as police officers. The investigating officer ('PW7') testified that Vijayan's family informed the police that he absconded to Singapore and could not be traced. The issues that arose for consideration were (a) whether the absence of Vijayan's testimony was fatal towards the prosecution and should be viewed in favour of the accused; and (b) whether the prosecution established their case beyond reasonable doubts.

Held (acquitting and discharging accused):

(1) The three elements that the prosecution would need to prove in order to establish a *prima facie* case against the accused are (i) that the drugs were dangerous drugs within the definition of the Act; (ii) that the accused was in possession and control of the drugs; and (iii) that the accused was trafficking in the drugs. On the facts, the chemist conducted the necessary analysis and tests on the white powdery substance contained in the five transparent plastic packages. The tests revealed that the white powdery substance contained 49.88g of heroin and 57.56g of monoacetylmorphines. These drugs were listed in the First Schedule of the Act read together with s. 11(2) of the Act. (paras 30-32)

(2) It was necessary for the prosecution to establish that the accused had control over the drugs, and that he had knowledge of the existence of the drugs to constitute possession. On the facts, the accused was the one who drove the Perodua Viva car and he was the only one in the car from the time he was under surveillance by the police until the time he stopped his car and was arrested. The package which contained the dangerous drugs was found on the floorboard of the driver's seat. Further, the act of the accused fleeing from the police and was chased for about two kilometres before being apprehended were admissible factors under s. 8 of the Evidence Act 1950 as it relates closely to the fact that the package containing the drugs were found on the floorboard of the car. As such, there was a clear nexus between his act of fleeing and the fact that he had actual physical custody of the drugs. (paras 36, 40, 41, 42 & 43)

(3) Having admitted the accused's conduct as evidence, it was not for the court to proffer any explanation for the accused's act of fleeing. The onus was on the accused to explain his conduct under s. 9 of the Evidence Act 1950. This onus could either be discharged at the prosecution stage by way of cross-examination of the prosecution's witnesses or at the defence stage. Taking into consideration the uncontroverted fact that the drugs were found in the car driven by the

A accused, that he was alone and he fled from the police, it could be safely inferred that the accused had possession and knowledge of the drugs. (paras 45 & 48)

(4) The net weight of the drugs seized was 107.44g, consisting of 49.88g of heroin and 57.56g of monoacetylmorphine. The weight was clearly
B above the minimum statutory limit of 15g, which raised the presumption of trafficking under s. 37(da)(iiia) of the Act. Judging from the manner in which the drugs were kept, and the amount, the reasonable inference was that the accused was carrying the drugs for the purpose of trafficking. Further, the accused was found with the drugs while he was
C in the white Perodua Viva car. From the evidence, his act connoted the act of transporting within the definition of s. 2 of the Act. In the circumstances, the prosecution had established a *prima facie* case against the accused. (paras 50-53)

(5) The accused bore the burden of rebutting the statutory presumption
D under s. 37(da) of the Act. The accused claimed to have good reasons for fleeing from the scene since the policemen were in plain clothes and he thought they were robbers. There was no evidence led to show that the police had identified themselves as police officers, when they set upon both the accused and Vijayan. The accused's explanation could be
E construed as that of a natural reaction of fear or panic, particularly in view of the fact that the policemen were not in uniform and they were in unmarked police cars. (paras 68, 73 & 74)

(6) The prosecution's witnesses confirmed that Vijayan was at the scene and that he too was arrested together with the accused. The accused
F attempted to absolve himself by implicating Vijayan. The accused raised the possibility that the drugs belonged to Vijayan and the latter had thrown the drugs into the car. If the accused's version was to be believed, it would mean that Vijayan was the trafficker and that the accused was a mere victim of Vijayan's doing. However, the prosecution
G did not call Vijayan as their witness nor was he offered to the defence. Although it was undisputed that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has a corresponding duty to call all necessary witnesses which were essential to the unfolding of the prosecution's case. (paras 75, 76, 79 & 80)

H **(7)** The prosecution has a duty to call all the necessary witnesses to establish proof beyond reasonable doubt and if in exercising its discretion the prosecution failed to fulfil this obligation, then the accused must be acquitted. The contradicting versions between the prosecution and defence could be explained had Vijayan be called to testify. The failure
I to call Vijayan as a witness created an ominous gap in the prosecution's case. Vijayan was arrested and must have been questioned by the police but there was no attempt to adduce any statement made by Vijayan

during the course of the trial. The prosecution had a dual duty, *ie*, to prove their case and to disprove the accused's defence. This principle has been termed as the principle of exclusion. (paras 82-84)

(8) The prosecution was alerted to the importance of Vijayan, if not at the prosecution stage then at the defence stage. The accused also had, during re-examination stated that he had informed the investigating officer of his version. This testimony was not challenged. The prosecution could have produced or at least attempted to produce Vijayan as a rebuttal witness in order to show that the accused's defence was doubtful or of little value. More efforts could have and should have been made by the police to trace Vijayan. However, no evidence was tendered to suggest that they had done so. Further, none of Vijayan's family members were called to confirm as to what was stated by the prosecution witnesses. In the end, the police statement on Vijayan's whereabouts was merely hearsay. (paras 85, 86 & 88)

(9) The prosecution's failure to call Vijayan as a witness left an indelible gap in their case. The omission was fatal to their case. Having given maximum evaluation of the evidence, the prosecution failed to establish their case beyond reasonable doubt. The accused was therefore acquitted and discharged from the charge. (para 90)

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Akin Khan v. PP [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 SC ***(refd)***
Burhanuddin Benjamil v. PP [2013] 1 LNS 149 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Abdul Rahman v. PP [2013] 7 CLJ 843 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
Ooi Chee Seong & Anor v. PP [2014] 7 CLJ 505 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Muhamad Nasir Saharuddin & Anor [1992] 1 LNS 8 HC ***(refd)***
PP v. Ouseng Sama-Ae [2008] 1 CLJ 337 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
Seneviratne v. R [1936] 3 All ER 36 PC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1), 182A
Dangerous Drugs Act 1952, ss. 2, 11(2), 37(da)(iiia), 39B(1)(a), (2)
Evidence Act 1950, ss. 8(2), 9

For the prosecution - Mohd Amril Johari; DPP
For the accused - Sanisvara Nethaji Rayer Rajaji; M/s R Nethaji Rayer & Co

Reported by Kumitha Abd Majid

JUDGMENT

Mohamed Zaini Mazlan JC:

[1] James Winsan ('the accused'), was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952'), with the offence of trafficking dangerous drugs, in the amount of 107.44g (49.88g heroin and 57.56g monoacetylmorphine), which is punishable under s. 39B(2) of the same Act.

[2] The charge reads as follows:

> In Bahasa Malaysia
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> Bahawa kamu pada 30 Ogos 2012, jam lebih kurang 4.30 petang di hadapan rumah No. 94, Taman Sungai Buloh, di dalam Daerah Sungai Siput Utara, di dalam Negeri Perak Darul Ridzuan, telah mengedarkan dadah berbahaya sejumlah berat 107.44 gram [49.88 gram Heroin dan 57.56 gram Monoacetylmorphine] dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) yang sama.
>
> Translation in English
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> That you had on the 30 August 2012, around 4.30 pm, in front of house No. 94, Taman Sungai Buloh, in the District of Sungai Siput Utara, in the state of Perak Darul Ridzuan, trafficked dangerous drugs weighing 107.44 gram [49.88 gram Heroin and 57.56 gram Monoacetylmorphine] and that you had committed an offence under Section 39B(1)(a) Dangerous Drugs Act 1952 punishable under Section 39B(2) of the same Act.

[3] The trial had already commenced before my predecessor, Ahmad Nasfy bin Haji Yasin J, where two of the prosecution's witnesses had already testified. They were Sergeant Omar Bin Haroon, the Deputy Investigating Officer of the police's Crime Investigation Department, and Corporal Mustapha Bin Syed Ali, the police's storekeeper. The learned Deputy Public Prosecutor and counsel for the accused had no objections for me to continue presiding over the trial. I have also perused the notes of proceedings, and found them sufficient to enable me to continue, without the need to recall the witnesses that had already given evidence.

[4] In brief, the accused was apprehended after a 2km car chase between him and the police. When he was apprehended, the police found a package containing the drugs concerned, in the car that the accused drove.

The Prosecution's Case

The Prosecution's Witnesses

[5] I shall for ease of reference, list out the prosecution's witnesses first:

PW1 Sergeant Omar bin Haroon

(Deputy Investigating Officer of the police's Crime Investigation Department)

PW2 Corporal Mustapha Bin Syed Ali

(Storekeeper at IPD Sungai Siput)

PW3 Inspector Mohd Suffian Bin Saari

(Head of the police's Narcotics Investigation Department ('NID') of Sungai Siput Utara Perak)

PW4 Nurul Fadlina binti Harun

(Chemist at the Jabatan Kimia Malaysia, Perak division)

PW5 SI Busra bin Abd Kadir

(Operations and detention officer of the police's Narcotics Department at IPK Perak)

PW6 Sergeant Husainudin bin Husain

(Surveillance and operations officer of the police's NID at IPD Sungai Siput, Perak)

PW7 Inspector Mohd Radzi bin Abdul Rahim

(Police's narcotics investigation officer at IPD Sungai Siput, Perak)

Facts

[6] PW3 had conducted a briefing with his officers at the NID office in Sungai Siput, on a Thursday, 30 August 2012. PW3 had prior to the briefing, received information of a drug transaction that will occur between two Indian men, at the car park near the Kentucky Fried Chicken ('KFC') restaurant building, and the MARA building at Sungai Siput, between 4pm to 5pm.

[7] PW3 had during the briefing, divided his team into four. The first team was headed by PW5 with three officers, the second team headed by DSN Kesevan with two officers, the third team headed by D/Cpl Hashim with three officers, and the fourth team headed by PW6 with three officers.

[8] PW3 had assigned himself the task of observing. He had positioned himself close to the open car park that was being observed. This car park is situated between the KFC restaurant and the MARA building.

[9] PW3 positioned himself behind the Celcom shop at the MARA building. The other three teams were positioned close to the area being observed. Incidentally, this area was only 300m away from the Sungai Siput IPD. All four teams were in unmarked police cars. All of them were also dressed in civilian clothes. These four teams were at their designated spots at around 3.30pm on that day.

[10] They did not have to wait long. At around 4.15pm, a dark green coloured Toyota Camry ('Camry'), was seen approaching the open car park. The driver was seen talking on his mobile phone while driving. The driver of this car, who was later identified as Vijayan, then stopped at the car park after making one round. Soon after, another car, which was a white Perodua Viva, was seen headed towards the Camry. This car was driven by the accused. He too was seen talking on his mobile phone while driving. There were no other vehicles seen in that area.

[11] PW3 testified that the accused drove his car slowly alongside Vijayan's car. PW5 who was in another car with his team, also gave similar evidence. PW3 also stated that both men were seen communicating to each other using hand signals, while still remaining in their car. PW3 was about 5m to 8m away from both vehicles.

[12] PW3 then instructed his teams *via* walkie-talkie, to ambush both vehicles. All four teams in their respective vehicles proceeded to surround both cars. PW5 and D/Cpl Hashim's teams managed to block Vijayan's car. However, the accused managed to evade the ambush, and had sped off.

[13] PW3 instructed PW5 to arrest Vijayan, and to inspect his car. PW3 then got on DSI Kesevan's vehicle and together with PW6's team, chased after the accused. The accused headed towards the main road leading from Ipoh to Kuala Kangsar. PW3 had a clear view of the accused's car during the chase. This chase, according to both PW3 and PW6, lasted for about 2km, before the accused's car was stopped in front of a house in Taman Sungai Buloh, Sungai Siput. According to PW3 and PW6, the accused was seated in his car, and that he had held up his hand to surrender.

[14] PW3 proceeded to turn off the engine of the accused's car, and identified himself as a police officer to the accused. He then conducted a physical examination on the accused and the accused's car with PW6 at his side. He found a black plastic bag underneath the accused's legs on the floorboard of the driver's seat. PW3 then opened the package in the presence of the accused and also PW6. He found five transparent plastic bags containing white powdery substance that he suspected were drugs. This was done in the presence of PW6.

[15] PW3 then called up PW5 to enquire the status, and was told by the latter that he did not find any incriminating substance on Vijayan nor his car. PW3 instructed PW5 to bring Vijayan to the police station at IPD Sungai Siput, while he and PW6 brought the accused to the same place in their respective vehicles.

[16] At the police station, PW3 prepared a search list of the goods seized, namely the white Perodua Viva car driven by the accused, a set of car keys with remote control, one black plastic bag, five packets of transparent plastic bags containing the white powdery substance, and proceeded to mark them. PW3 then lodged a report titled 'Sg. Siput Report No. 2499'.

[17] Later during the day, PW7, the police's investigating officer, was informed of the accused and Vijayan's arrests. Both the accused and Vijayan were handed over to PW7. The search list and seized goods were also handed over to PW7 by PW3.

[18] PW7 then instructed PW1 to take photos of the goods seized from the accused. He had also instructed PW1 to dust the five transparent plastic packages for fingerprints. He was informed by PW1 that he could not lift any complete fingerprints. PW7 then kept the case exhibits under lock and key in a cabinet in his room. Only PW7 had the keys to this cabinet. The two vehicles seized, namely the white Perodua Viva, and the Camry, were sent to the police vehicles store.

[19] Two days after the arrest, which was on the 1 September 2012, PW7 took out the packages containing the white powdery substance for weighing, and also for PW1 to take photographs. This was done in the presence of the accused. PW7 then put the case exhibits into an A4 size box, and proceeded to seal the box in the presence of the accused.

[20] On the following day, PW7 took the sealed box containing the case exhibits, and went to Jabatan Kimia Malaysia in Ipoh. He handed over the box to PW4, who then issued an official receipt.

[21] PW7 then investigated on the ownership of the white Perodua Viva car that was driven by the accused. His investigations revealed that the car was registered in the name of Thana Letchumi a/p Palani. PW7 also went to the area where the stake out was done and made a sketch of the area.

[22] PW7 investigated the events leading to the arrest. His testimony on the stake out, the ambush and the eventual arrest of the accused and Vijayan, were the same as testified by PW3, PW5 and PW6. PW7 had on 29 October 2012, handed over the case exhibits to PW2, save for the Camry, which according to PW2, had been handed back to its owner.

[23] As for Vijayan, PW7 testified that the police had decided not to charge him. PW7 added that he had been made to understand from Vijayan's family, that Vijayan had ran off to Singapore, and that the police could not trace him until now.

[24] The following facts were not disputed nor challenged by the accused's counsel:

(a) the date, time and location that the accused were arrested as stated in the charge;

(b) the black plastic bag had contained five transparent plastic packets of drugs;

(c) that the accused fled in his car when ambushed by the police;

(d) the accused stopped his car after being chased by the police, and had held up his hand to surrender;

(e) the case exhibits that were seized in this case;

(f) that the drugs seized were dangerous drugs weighing 107.44g, consisting of 49.88g of heroin, and 57.56g of monoacetylmorphine;

(g) that the white Perodua Viva car was driven by the accused, and that there were no one else in the car when he was pursued and eventually arrested by the police.

Duty Of The Court At The End Of The Prosecution's Case

[25] The duty of the court at the end of the prosecution's case has been statutorily set under s. 180(1) of the Criminal Procedure Code ('CPC'), as follows:

> 180. Procedure after conclusion of case for prosecution
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> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
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> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter his defence.
>
> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence, which if unrebutted or unexplained would warrant a conviction.

[26] Although the term *prima facie* has not been statutorily defined in the CPC, much guidance can be gleaned from the plethora of decided cases. However, it would suffice for me to refer to the judgment of Augustine Paul J (later FCJ), in the case of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 (HC), where His Lordship had this to say:

> The meaning of *prima facie* in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A *prima facie* case rises where the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable

that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a *prima facie* case has been made out in order to call for a defence.

[27] Gopal Sri Ram JCA (later FCJ), in delivering judgment for the Court of Appeal in *Looi Kow Chai v. PP* [2003] 1 CLJ 734 (CA), elaborated on the duty of the trial judge at the end of the prosecution's case, where he said:

It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[28] From these authorities, it is clear that the onerous duty of the trial judge at this stage is to give a maximum evaluation of the evidence presented by the prosecution. Arising from that, this court should only come to the conclusion that the prosecution has made out a *prima facie*, if having subjected the evidence presented to a maximum evaluation, is satisfied that the accused can be convicted, should he elect to remain silent. It is as such, incumbent upon this court, to carry out a maximum evaluation of the evidence presented by the prosecution.

Findings At The End Of The Prosecution's Case

[29] Section 37(da) of the DDA 1952 provides as follows:

any person who is found in possession of:-

(iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[30] There are three elements that the prosecution will need to prove, in order to establish a *prima facie* case against the accused: that the drugs were dangerous drugs within the definition in the DDA 1952; that the accused was in possession and control of the drugs; and that the accused was trafficking in the drugs. I shall now proceed to analyse the evidence presented for each element.

Whether The Drugs Were Dangerous Drugs Under DDA 1952

[31] PW4, the chemist from Jabatan Kimia Malaysia, confirmed the sequence pertaining to the handing over of the case exhibits by PW7. She had been a chemist since 19 May 2004. She had conducted the necessary analysis and tests on the white powdery substance contained in the five transparent plastic packages. The tests revealed that the white powdery substance contained 49.88g of heroin, and 57.56g of monoacetylymorphines. The results of the tests were set out in the chemist's report, which she tendered during the trial. These drugs are listed in the First Schedule of DDA 1952, read together with s. 11(2) DDA 1952.

[32] In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, Mohamed Azmi SCJ, delivering the judgment of the Supreme Court said this:

> As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copy right or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that is this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

[33] Having considered PW4's testimony, it can be safely concluded that the drugs seized were of the type and weight as testified by her and set out in the chemists report.

Whether The Accused Was In Possession And Control Of The Drugs

[34] Although possession is not defined in DDA 1952, many cases have sought to define possession in the context of DDA 1952. In *PP v. Muhamad Nasir Bin Saharuddin* [1992] 1 LNS 8; [1994] 2 MLJ 576 (HC) it was held that the prosecution may either adduce direct evidence, or rely on the presumptions under s. 37 of DDA 1952, to establish that the accused had knowledge of the drugs, and that he had some form of control or custody over the drugs.

[35] The prosecution sought to rely on the presumption of trafficking under s. 37(da) DDA 1952, which states:

> any person who is found in possession of:
>
> (iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphine or a total of 15 grammes or more in weight of any of the said dangerous drugs;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[36] It is necessary for the prosecution to establish that the accused had control over the drugs, and that he had knowledge of the existence of the drugs to constitute possession; *PP v. Muhamad Nasir Bin Saharuddin* [1992] 1 LNS 8; [1994] 2 MLJ 576.

[37] The same principle was elucidated by the apex court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, where Arifin Zakaria FCJ (now CJ), in delivering judgment for the Federal Court held:

> But mere custody and control is not sufficient to establish possession for the purpose of the Act. There has to be established knowledge of such drug by the respondent.

[38] The Court of Appeal in *PP v Ouseng Sama-AE* [2008] 1 CLJ 337, set out the requirements before a *prima facie* case can be established against the accused, in relying on the presumption under s. 37(da) DDA 1952:

> Now, in order to establish a *pima facie* case against the accused by reliance on the presumption under s. 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused had at the material time had knowledge of the drug found to be in his possession, that is to say that he had "*mens rea* possession".

[39] Unless an accused had admitted to having knowledge of the drugs, knowledge in most cases cannot be adduced by direct or tangible evidence, and can only be inferred from the surrounding circumstances; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; [1997] 3 MLJ 795 (CA). I am inclined to hold that whether the accused had possession and knowledge of the drugs had to be inferred from the circumstances.

[40] It is an undisputed fact that the accused was the one driving the white Perodua Viva car, and that he was the only one in the car from the time that he was under surveillance by the police, up until the time where he had stopped his car and was arrested. PW3 had immediately searched the car that the accused drove, after the latter was stopped. It was PW3's testimony that he had found the package containing the drugs 'di bahagian kaki pemandu' (at the leg area on the driver's side). I take this to mean that the package was found on the floorboard of the driver's seat. PW6 confirmed this.

[41] It is also not disputed that the accused fled the scene when the police set on him. The fact that the accused fled from the scene is a factor that can be taken into consideration under s. 8(2) of the Evidence Act 1950 ('EA 1950'), which states:

> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person to an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[42] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19, the Federal Court provided a useful guideline before reliance on s. 8 EA 1950 could be justified. Augustine Paul FCJ in delivering judgment for the Federal Court had this to say:

> If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible.

[43] Taking cognisance from that, I am of the view that the act of the accused fleeing from the police, and was chased for about 2km before being apprehended, are admissible factors under s. 8 EA 1952, as it relates closely to the fact that the package containing the drugs were found on the floorboard of the driver's side of the car, as alleged by the police. There is a clear nexus between his act of fleeing, and the fact that he had actual physical custody of the drugs.

[44] As was said in the *Parlan Dadeh* case (*supra*), conduct such as flight of an accused is a positive act, and easier to establish, as compared to an accused looking stunned, nervous or frightened, which would be a matter of perception that requires more detailed evidence.

[45] Having admitted the accused's conduct as evidence, it is not for this court to proffer any explanation for the accused's act of fleeing. The onus is on the accused to explain his conduct under s. 9 EA 1950. This onus can either be discharged at the prosecution stage by way of cross-examination of the prosecution's witnesses, or at the defence stage; see *Parlan Dadeh* (*supra*).

[46] The defence counsel when cross-examining PW3, suggested that the accused was startled, and that he had sped off as the police had fired a few shots when setting upon him, coupled with the fact that the police were in unmarked vehicles. PW3 however denied that the police had fired shots.

[47] I find the suggestion that the police had fired shots to be inherently improbable. The area that the accused was set upon by the police was an open public area, within the vicinity of commercial shops. In my opinion, it is unthinkable for the police to be firing shots in a public area, as it may endanger the public. Furthermore, the police were merely apprehending persons that they suspected were involved in drug trafficking, as opposed to criminals that were involved in violent crimes. I suppose that the police in situations of the latter, would be more inclined to draw their weapons as a precaution, and even fire warning shots, as opposed to a drug raid.

[48] Taking into consideration the uncontroverted fact that the drugs were found in the car driven by the accused, that he was alone, and that he had fled from the police, it can be safely inferred, that the accused had possession and knowledge of the drugs.

Whether The Accused Was Trafficking In The Drugs

[49] Trafficking has been statutorily defined in s. 2 DDA 1952 as follows:

> "Trafficking" includes the doing of any of the following acts, that is to say manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[50] The net weight of the drugs seized from the accused was 107.44g, consisting of 49.88g of heroin and 57.56g of monoacetylmorphine. The weight is clearly above the minimum statutory limit of 15g, which raises the presumption of trafficking under s. 37(da)(iiia) DDA 1952.

[51] The drugs were also contained in five transparent plastic packets, and stored in a black plastic bag. The amount of the drugs itself gives rise to the inference that it could not have been for his personal use. Judging from the manner in which the drugs were kept, and the amount, the reasonable inference is that the accused was carrying the drugs for the purpose of trafficking.

[52] Furthermore, the accused was found with the drugs while he was in the white Perodua Viva car. From this evidence, his act connotes the act of transporting within the definition of s. 2 DDA 1952. In *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 84 (PC), Lord Diplock delivering judgment for the Privy Council had this to say:

> "Transport", although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb "transport", to which attention has been

A drawn, attracts the *maxim noscitur a sociis*. This, and the fact that it appears in the definition of the verb to "traffic", of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that "transport" is not used in the sense of mere
B conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another.

Conclusion Of The Court At The End Of The Prosecution's Case

[53] Having considered all the evidence adduced by the prosecution, and
C subjecting them to maximum evaluation, this court came to the conclusion that the prosecution had established a *prima facie* case against the accused. The accused was explained the three courses that he could elect to choose which he understood. The accused elected to give sworn evidence.

The Defence's Case

D

[54] On the 30 August 2012, the accused claimed that he was in his house watching television, when he received a phone call at around 4pm. The call was from a friend named Vijayan, whom he had known for the past one to two years, and was a family friend. Apparently, Vijayan owed him money. This had caused his relationship with Vijayan to be strained. Vijayan owed
E the accused RM30,000, but had already paid half of it, leaving a balance of RM15,000.

[55] Vijayan wanted to settle the amount, and had asked the accused to meet him in Sungai Siput. The accused was not keen, and had asked Vijayan to just bank in the money into his bank account. Vijayan was adamant, and
F insisted on meeting the accused, as he wanted to pay in cash before he goes outstation. The accused relented, and agreed to meet at the KFC restaurant in Sungai Siput as suggested by Vijayan.

[56] The accused drove to the meeting point in the white Perodua Viva.
G Vijayan had apparently directed the accused to the exact meeting point, by communicating through their respective mobile phones. The accused saw Vijayan driving the Camry. Vijayan then drove his car close to the accused's car. The accused claimed that his car and Vijayan's car were both side-by-side facing the same direction.

H **[57]** At this point in time, the accused claimed that Vijayan showed him a black plastic bag, and that he had told the accused that it contained the money that he owed the accused. Vijayan then put the black plastic bag on the seat of the passenger side of the accused's car.

[58] As soon as Vijayan started moving away in his car, the accused heard
I firecracker sounds emanating from behind his car. He then turned around, and saw three Malay men running towards him with one of them holding a gun. They were dressed in plain clothes.

[59] The accused immediately took off. He was apprehensive, due to the fact that he had what he thought was cash amounting to RM15,000 in his car. He was afraid of being shot. He only managed to drive for 2km before the police stopped him. The accused claimed that one policeman was pointing a gun at him. His reaction was to hold up his hand to surrender. He also claimed to have told the policemen to take the money and not harm him.

[60] The accused was apprehended, and put into an unmarked police car. The accused claimed that he still did not know that those men were police officers. He had only realised that they were policemen when the car that he was in reached the police station.

[61] The accused claimed that he did not know what was in the black plastic bag. He could only guess that it contained the money that Vijayan wanted to pay. He had only come to know that the bag contained drugs when the contents were opened and shown to him at the police station.

[62] He had seen Vijayan at the police station too, and that the latter was handcuffed. It dawned upon him that Vijayan too had been arrested. However, he was not able to communicate with Vijayan.

[63] When cross-examined by the learned Deputy Public Prosecutor, the accused agreed to the suggestion that he had only brought up his story of Vijayan owing him money and that the latter had asked him to meet at the place concerned to pay, for the first time in court. However, the accused had when re-examined by his learned counsel, clarified that what he meant was that he was only able to articulate his defence in court for the first time. He also mentioned that he had informed the investigating officer of his version.

The Court's Duty At The End Of The Defence Case

[64] Section 182A CPC sets out the procedure at the conclusion of the trial, which reads:

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[65] It is therefore incumbent upon a trial court, to consider and analyse all the evidence adduced, and I emphasise the word 'all', and come to a conclusion, whether the prosecution has proven its case beyond reasonable doubt.

[66] In *Mat v. PP* [1963] 1 LNS 82 (HC) Suffian J (as he then was), set out the stages that a trial court should adhere to:

(a) if you are satisfied beyond reasonable doubt as to the accused's guilt - convict;

(b) if you accept or believe the accused's explanation - acquit;

(c) if you do not accept or believe the accused's explanation - do not convict but consider the next steps below;

(d) if you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt - convict; and

(e) if you do not accept or believe the accused's explanation, but nevertheless it raises in your mind a reasonable doubt as to his guilt - acquit.

[67] The onus of proving an accused's guilt, from the inception of the trial, until its conclusion, lies on the prosecution. It is a time honoured right of an accused to be presumed innocent until proven guilty. The prosecution has the onerous task of proving its case beyond reasonable doubt, as opposed to an accused, who merely has to cast a reasonable doubt in the prosecution's case; *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073 (SC).

[68] Nevertheless, the accused here bears the burden of rebutting the statutory presumption under s. 37(da) DDA 1952. The burden however, is not as onerous as the prosecution's beyond reasonable doubt, for it is only on a balance of probabilities; *Akin Khan v. PP* [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 (SC).

[69] Sharma J had in *PP v. Saimin & Ors* [1971] 1 LNS 115 (HC) set out a most useful guideline on what would constitute a reasonable doubt:

> It has again been said that "'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there". Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence. (17)

[70] I shall now turn to analyse accused's defence.

Analysis Of The Defence

[71] The main thrust of the accused's defence is that the drugs do not belong to him. The accused maintained that he had only met Vijayan on the latter's insistence, more so when it was purportedly for Vijayan to pay what was owed to him.

[72] The accused was also adamant, that it was Vijayan who had thrown the plastic bag containing the drugs into his car and that he all along thought that the plastic bag contained the RM15,000 that Vijayan promised to pay. The accused sped off when he was pursued by the police. He also managed to drive for about 2km before being stopped.

[73] The prosecution sought to rely on s. 8 of the EA 1950 in submitting that the accused's act of fleeing from the scene is an inference of guilt. The accused claimed to have good reasons for doing so, as the policemen were in plain clothes. He thought they were robbers. He did not stop when being pursued as the police were using unmarked police cars. There was no evidence led to show that the police had identified themselves as police officers, when they set upon both the accused and Vijayan.

[74] I am of the view that the accused's explanation can be construed as that of a natural reaction of fear or panic, particularly in view of the fact that the policemen were not in uniform, and that they were in unmarked police cars. In *Burhanuddin Benjamil v. PP* [2013] 1 LNS 149; [2013] MLJU 255 (CA) the Court of Appeal construed the accused's flight in his favour, as the arresting officer did not identify himself as the police.

[75] I now come to the issue of Vijayan. It is without doubt that Vijayan exists. The prosecution's witnesses confirmed that Vijayan was at the scene, and that he too was arrested together with the accused. The accused is attempting to absolve himself by implicating Vijayan. If the accused's version is to be believed, it would mean that Vijayan was the trafficker, and that the accused was a mere victim of Vijayan's doing.

[76] The prosecution did not call Vijayan as their witness, and nor was he offered to the defence. PW7 testified that Vijayan had already absconded to Singapore, and that he had obtained this information from the family members. Nothing more was said whether the police had made concerted efforts to trace Vijayan.

[77] The pertinent issue now is whether the absence of Vijayan's testimony is fatal towards the prosecution, and should be viewed in favour of the accused.

[78] In this case, PW3 testified that the police had received a tip-off that a drug transaction was going to take place at the stipulated time and place. In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113, His Lordship Zulkifli Makinuddin FCJ (now CJM), referred to the then Supreme Court's decision in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1, where the apex court

highlighted the danger of relying on tip-off cases, as there are possibilities that the drugs could be planted to implicate an accused. His Lordship, taking cue from the *Abdullah Zawawi* case (*supra*), stated that it is for, the accused to raise the possibility of others having access, and for the prosecution to exclude that possibility.

[79] Taking that into the context of this case, the accused has raised the possibility that the drugs belonged to Vijayan, and that Vijayan had thrown the drugs into his car. Even if one were to assume for a moment, that the accused's version is improbable or a fanciful tale, should the prosecution have called Vijayan as their witness, or at the very least offer him to the defence? Vijayan was after all, part of the prosecution's narrative of the events that occurred.

[80] Although it is undisputed that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has a corresponding duty to call all necessary witnesses which are essential to the unfolding of the prosecution's case; *Ibrahim Mohamad* (*supra*). In the words of Lord Roche in *Seneviratne v. R* [1936] 3 All ER 36 (PC):

> Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in their result the effect of their testimony is for or against the case for the prosecution.

[81] Closer to home, in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 (FC), Edgar Joseph Jr FCJ, delivering judgment for the Federal Court had this to say:

> In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence, or in default, to have explained why there were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Morever, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, the prosecutor will ensure that the accused is given the opportunity to call the witness.

[82] His Lordship Balia Yusof bin Wahi JCA (now FCJ) had in the case of *Mohamad Abdul Rahman v. PP* [2013] 7 CLJ 843, adapted the *dicta* in *Ti Chuee Hiang* (*supra*) and held that the prosecution has a duty to call all the necessary witnesses to establish proof beyond reasonable doubt, and if in exercising its discretion the prosecution failed to fulfil this obligation, then the accused must be acquitted.

[83] No doubt, the prosecution's witness, PW3, testified that he had observed both the accused and Vijayan's car, and that he did not see Vijayan throwing any package into the accused's car, but he was the only prosecution witness that said that. The accused claimed that Vijayan had placed the

plastic bag on the passenger side of his car, and that Vijayan's car and his car were facing the same direction. PW3 however, claimed that the plastic bag containing the drugs was found on the floorboard on the driver's side underneath the accused's legs. These contradictions could perhaps be explained had Vijayan be called to testify. Vijayan exists, and is not a fictitious character. The failure to call Vijayan as a witness, creates an ominous gap in the prosecution's case.

[84] Vijayan was arrested and must have been questioned by the police, but there was no attempt to adduce any statement made by Vijayan during the course of the trial. The prosecution has a dual duty; to prove their case, and to disprove the accused's defence. This principle has been termed as the principle of exclusion; *Ooi Chee Seong & Anor v. PP* [2014] 7 CLJ 505 (CA).

[85] It was obvious that the prosecution was alerted to the importance of Vijayan, if not at the prosecution stage, then at the defence stage. As mentioned earlier, the accused had during re-examination, stated that he had informed the investigating officer of his version. This testimony was not challenged.

[86] The prosecution could have produced, or at least attempt to produce Vijayan as a rebuttal witness, in order to show that the accused's defence was doubtful, or of little value; *PP v. Chia Leong Foo* [2000] 4 CLJ 649; *Ooi Chee Seong & Anor v. PP* [2014] 7 CLJ 505 (CA).

[87] In *Ooi Chee Seong* (*supra*), the Court of Appeal concurred with the approach suggested by Gopal Sri Ram JCA (later FCJ), in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, where it was said:

> In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamed Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. *Whenever such a defence is taken the trial judge must carry out two separate exercises. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the Radhi direction and must be administered by a court unto itself when such a defence is taken.*
>
> (emphasis added)

[88] I am aware that PW7 had testified that Vijayan could have fled to Singapore, according to his family members. I take the view that more efforts could have, and should have been made by the police to trace Vijayan. No evidence was tendered to suggest that they have done so. None of Vijayan's family members were also called to confirm what PW7 had stated. In the end, PW7 statement on Vijayan's whereabouts was merely hearsay.

Conclusion

[89] The prosecution submitted that the entire defence put up by the accused were afterthoughts. I beg to differ, as the accused has testified that he had informed the investigation officer during the investigation stage his counsel had also during the prosecutions stage put forward the defence theory to the prosecution's witnesses.

[90] The prosecution's failure to call Vijayan as a witness leaves an indelible gap in their case. The omission is fatal to their case. Having given maximum evaluation of the evidence, I find that the prosecution has failed to establish prove their case beyond reasonable doubt. The accused is therefore acquitted and discharged from the charge.